IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 204 of 1992

in

SPECIAL CIVIL APPLICATIONNo 2326 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI
and
Hon'ble MR.JUSTICE M.C.PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

JAGDISHBHAI BHIMRAI SETALVAD

Versus

NEW BRAHMA KSHATRIYA CO-OP. HOUSING SOCIETY LTD

Appearance:

MR KA PUJ for Appellants

MR AK CLERK for Respondent No. 1

MS DS PANDIT, AGP for Respondent No. 2

CORAM : MR.JUSTICE R.K.ABICHANDANI
and
MR.JUSTICE M.C.PATEL

Date of decision: 17/03/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE R.K.ABICHANDANI)

1. The appellants challenge the order dated 2nd April 1992 made by the learned Single Judge in Special Civil Application No. 2326 of 1992 dismissing the petition in which the appellants had challenged the action of the respondent No.1 - Cooperative Housing Society of deducting an amount of Rs.3,25,085=00 by way of premium from the sale consideration that the appellants were to receive pursuant to the sale of their house property in the society, and also the approval granted by the respondent No.2 - District Registrar of Cooperative Societies to Regulation 6A [Form B] of the Byelaws of the Society, pursuant to which such premium was deducted. A direction was also sought on the District Registrar to secure implementation of his circular dated 20-4-1988 and thereby get released the aforesaid amount to the appellants.

2. Sub-plot No. 23 in the respondent - society was in the joint names of the appellants and was sold by them to Devan Vikas Mandal and New Devan Vikas Mandal by different registered sale deeds dated 15-2-1991. The Managing Committee of the Society resolved on 9-2-1991 to enter the name of the transferee as the member of the society. The transferee deposited the full value of consideration of Rs.26,07,231=04 with the society and out of that amount, the society deducted Rs.3,26,085=00 as premium of sale consideration as per the provisions contained in Regulation 6A of Form `B' attached to the byelaws.

3. The learned Single Judge noted that a notice under section 167 of the Gujarat Cooperative Societies Act, 1961 was already issued by the appellants to the society and that if the appellants felt that they had a right to recover the amount of premium taken by the society, it would be a dispute which would fall within the ambit of the said Act. The learned Single Judge held that the premium was deducted at the rate of 12.5% from the sale consideration of the property as per the then prevailing Regulation 6A of the byelaws which empowered the society to charge such premium. Dealing with the challenge against the said Regulation 6A, it was held that it was a byelaw duly sanctioned by the Registrar and was in force on the date of the transaction and that therefore, the petitioners had, prima facie, no good case.

4. The learned counsel appearing for the appellants contended that neither the said Act nor the Rules made thereunder, made any provision with regard to collecting premium in the manner in which it was sought to be done by Regulation 6A. He submitted that such collection adversely affected proprietary interest of the members of the society, and that it was beyond the authority and competence of the society. The collection of premium was not supported by any provision in the Statute or the Rules. It was argued that premium collected by the society was in form of a levy or tax and was therefore contrary to Article 265 of the Constitution, which provided that no tax shall be levied or collected except by authority of law. In respect of this contention, he placed reliance on the decision of the Supreme Court in Bimal Chandra Banerjee v. State of Madhya Pradesh reported in AIR 1971 SC 517.

4.1 The learned counsel further argued that the provisions of Section 30 (Restrictions on transfer of share of a member), Rule 17 or 18 or byelaws 21 and 22 did not empower the society to impose such a charge. It was contended that, by earlier circular dated 20th April 1988, the Registrar had issued instructions to the cooperative societies to carry out the amendment proposed by him in their byelaws and therefore, he could not have approved Regulation 6A on 13-1-1989 which was contrary to those instructions. He also pointed out that the Council had taken a decision on 17th January 1991 on the basis of which the Registrar had issued circular on 13-2-1991, which also placed an embargo on charging premium higher than which was fixed in the circular; that upper limit being Rs.50,000=00.

5. Section 13 of the Act provides that any amendment of the byelaws of a society would require registration under the Act. When the amendment is forwarded to the Registrar, he is required to satisfy himself whether it is in consonance with the provisions of the Act or the Rules and if he is satisfied that the amendment is not contrary to the Act or the Rules, he may register such byelaw. Section 14 empowers the Registrar to issue directions to the society for making the amendment in the byelaws when he finds that it is necessary or desirable in the interest of such society to make such amendment. Once he satisfies that such amendment is necessary or desirable and calls upon the society to make it, but the society defaults, the Registrar is empowered by sub-section (2) of section 14, after hearing the society and getting prior approval of the State Cooperative

Council, to register such amendment. The Registrar did in his circular dated 11-1-1988 suggest to all the societies amendment in their byelaws to the effect that the premium chargeable from the members purchasing the property would be between Rs.500=00 to Rs.10,000=00. In the earlier part of this communication (a blank proforma of which appears at page 52 of the present paper book), there is a reference to the provision of section 14(1). There is no material on record to indicate that the procedure under sub-section 14(2) was followed qua the respondent society. The byelaw which was subsequently proposed in the circular dated 13-2-1991 by the Registrar in a modified form by raising the limit of premium was not registered as an amendment under section 14(2). The Registrar had by circular dated 13-2-1991, which is at Annexure `A' to the affidavit in rejoinder filed in Civil Application No. 939 of 1992, referred to the earlier circular dated 11-1-1988 and the resolution of the Council dated 17-1-1991, and stated that the amendment was required to be done in the byelaws under section 14(2) of the Act for the purpose of achieving uniformity in the matter of charging of premium and the societies were informed that any resolution fixing a lumpsum amount by way of premium in respect of such transactions will not be recognised, if it contravenes the byelaw which was directed to be framed for charging of such premium. Though the power is conferred on the Registrar to direct amendment of the bye-laws of the Society, yet the paramount consideration is the interest of the society and such directions should satisfy the requirement of the interest of the society. What is in the interest of the society is primarily for the society alone to decide and it is not for an outside agency to say, as has been held by the Supreme Court in context of section 14 of the Maharashtra Cooperative Societies Act, 1960 in State of Maharashtra v. Karvanagar Griha Rachna Sanstha Maryadit reported in (2000) 9 SCC 295. Admittedly, the above circular dated 13-2-1991 issued under section 14(2) of the Gujarat Cooperative Societies Act was challenged in Special Civil Application No.3161 of 1992 which was filed on 6-5-1992, as stated by the learned counsel for both the sides and that matter is pending for final hearing and the circular has been stayed. The net effect is that the byelaw which is suggested by the Registrar did not become operative under section 14(2) and therefore can not supersede Regulation 6A of the bye-laws under which the premium was charged by the society.

6. The transfer of share or interest in the capital of a society is made subject to such conditions as may be prescribed by rules. Rule 5 requires every society to

make byelaws on the matters mentioned in sub-rule 2(a) to (t). Sub-rule (e), (f) and (g) thereof require the society to make byelaws on the terms and qualifications for admission to membership, privileges, rights and liabilities of members, and, payments for acquisition of interest in the society before the rights of membership are exercised. No person shall exercise the rights of a member or a society unless he has fulfilled all such conditions as are laid down in the byelaws of the society for exercising the rights of membership as provided by Rule 14(3). No transfer of shares will be effective unless it is made in accordance with the provisions of the byelaws under Rule 18(1) of the Rules.

6.1 Though the framing of byelaws or amendments therein are done in pursuance of the provisions of the Act and the Rules, such byelaws contemplated by the Act cannot be held to be law or to have force of law on the principle of delegated legislation. These byelaws can be merely those which govern the internal management, business or administration of a society. They are of the nature of Articles of Association of a Company incorporated under the Companies Act, as held by the Supreme Court in Cooperative Central Bank Ltd. v. Additional Industrial Tribunal, Andhra Pradesh, reported in AIR 1970 SC 245 and in Babaji Kondaji Garad v. Nasik Merchants Cooperative Bank Ltd., reported in (1984) 2 SCC 50.

7. In the Bye-laws of the Respondent Society, there is a provision regarding transfer of shares in bye-law 21. Such transfer of a share in the capital of the society is quite a distinct matter from a disposition or devolution of or dealing with a plot held by the member as per the allotment thereof to him by the society which is governed by Regulations relating to lease to be granted by the society to members desiring to purchase their houses contained in Form B which is part of the Bye-laws of the society. Regulation 6 thereof prevents a member from transferring the property without the previous consent in writing of the society and the impugned Regulation 6A enables the society to charge a premium being 1/8th of the amount received by the member who is permitted such disposition. Regulation 6A was approved by the Registrar and registered with effect from 12-1-1989. The provision in the Regulation for charging premium over the transactions by which the members disposed off their plots held by them on allotment by way of a long term lease is nothing but an exercise of its rights by the society which does not cease to be the owner of the plot after its allotment to a member on such

long term lease. The society can, in context of its own rights over the land, charge premium while allowing disposition of the allotment rights in the plot. The charging of such premium by the society as per the bye-laws which bind its members can never be termed as tax or levy, because, it is a payment in consideration of giving consent to transfer the leasehold rights to the purchaser. The challenge against Regulation 6A on the ground that it violates Article 265 of the Constitution is therefore wholly misconceived.

8. It will be seen that under byelaw 54(i) of the Respondent Society, the managing committee of the society was empowered to make regulations and enforce them as regards the terms and conditions relating to the tenants of the society and the property of the society and the letting and sale thereof as the committee thinks fit, provided that such regulations, terms and conditions were previously approved in writing by the Registrar. Admittedly, Regulation 6A in Form `B', which contains the set of Regulations relating to leases to be granted by the society to members desiring to purchase their houses, was duly approved by the Registrar on 13-1-1989. The validity of this Regulation 6A which was an amendment duly approved by the Registrar under section 13 of the Act was not challenged under section 153 of the said Act, which includes in its enumeration an order or decision made under section 13 of the Act. The Supreme Court in State of U.P. v. C.O.D. Chheoki Employees' Coop. Society Ltd., reported in (1997) 3 SCC 681, has held that a member of a society has no independent right qua the society and he cannot assail constitutionality of the Act, rules and bye-laws as he has a right under the Act, rules and byelaws and is subject to its operation, and that, "the stream cannot rise higher than the source".

9. We agree with the learned Single Judge that the appellants at best could have approached the authorities under the Act in context of the amended byelaws if at all they were aggrieved. It is obvious that they did not raise any grievance against the amended byelaws, at the earlier point of time when it was sent to the Registrar for approval and was approved perhaps because they did not think of disposing of the property at that time. Having been party to the framing of the impugned Regulation as members of the society and having been allowed it to remain on the society's books without disputing its validity under section 153 of the Act, it would not be open for the appellants to agitate against the validity of the byelaw in a petition under Article 226 of the Constitution. Shorn of its challenge against

the impugned Regulation contained in the bye-laws of the society, the petition remains virtually a plaint for recovery of money claim for an amount which according to the appellants was wrongly deducted by way of premium. Even for such a relief, a writ petition would not be an appropriate remedy, because, the said Act makes special provisions for adjudicating upon such disputes between the members and the society.

10. We therefore do not find any infirmity in the impugned order and dismiss the appeal with no orders as to costs.

MARCH 17, 2001 [R.K.ABICHANDANI, J.]

[M.C.PATEL, J.]

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